thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.' *That power given to the court to make declaratory judgments is purely discretionary, and the court is not bound to entertain such an application except in a proper case.*" (The italics are mine).

The respondents urged the court to dismiss the application on the ground that it was not a proper case for the exercise of discretion in favour of the appellant. We were referred to Order 54A, rule 4 which reads:—

"The court or judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

The High Court did not deal with this aspect but in view of the negative character of the declaration sought I am disposed to agree with the objection to granting the declaration sought in the summons.

One other point which is significant is the letter of the appellant union to the third respondent, paragraph 1 of which reads:—

"We wish to inform you that *majority of the employees* in M/s. Selangor Pewter Co. Sdn. Bhd. *are members of our Union* and *we are submitting this claim for recognition in accordance with the provisions of Section 8 of the Industrial Relations Act 1967.*" (The italics are mine).

and, in paragraph 8 of the affidavit, it is admitted that the *question of recognition* would only *be decided after it was determined whether the union was entitled to represent the workers.* Section 8 of the Industrial Relations Acts clearly provides the machinery for dealing with this question of recognition. It was for the Minister to decide the question and "any decision made by him" thereon "shall be final and shall not be questioned in any court." I reproduce the relevant sections to remove any doubt on this point:—

"8. (2) A trade union of workmen may serve on an employer or on a trade union of employers in writing a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within thirty days after the service of such claim either accord recognition or, if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds therefore.

(4) Upon receipt of a notification under subsection (3) or where an employer or a trade union of employers has failed to comply with the provisions of subsection (3), the trade union of workmen may report the matter in writing to the Minister.

(5) The Minister, upon receipt of a report under subsection (4) may take such steps as may be necessary or expedient to resolve the matter and shall, if the matter is not resolved, give a decision; and the Minister's decision as to who shall be workmen in managerial or executive positions or employed in confidential capacity or engaged in security work made under subsection (1) of this section and any decision made by him under this section shall be final and shall not be questioned in any court."

The appellant desired a declaration that the Registrar of Trade Unions is not empowered under Section 12(2) of the Trade Unions Ordinance 1959 to rule that the workers of the Selangor Pewter Co. Sdn. Bhd. cannot properly be members of the Metal Industry Employees Union. One perhaps wonders then why the appellant Union should, through its solicitors, request permission of the Registrar to register the workers(see paragraph 12 of the affidavit of its President sworn on September 20, 1973).

Here also, the court did not say that the real issue was essentially one of recognition and Section 8 was mentioned by Senior Federal Counsel in arguments before the Court. Having regard to the provisions of Section 6 of the Trade Unions Ordinance, 1959 and to Section 8 of the Industrial Relations Act, 1967, I am of opinion the application is misconceived and the court has no jurisdiction to grant the declaration.

It would also not be out of place to point out that the terms of the declaration sought, namely, that the "Registrar of Trade Unions is not empowered under Section 2(2) of the Trade Unions Ordinance, 1959...." is *ex facie* wholly irreconcilable with paragraph 12 of the affidavit of the President of the Union sworn to on September 20, 1973, in support of the motion which has been referred to earlier in the judgment to the effect that the majority of the employees are already members.

I am therefore of the view that this appeal is without merit and the appeal is dismissed with costs.

Suffian L.P. concurred.

Appeal dismissed.

Solicitors: *D. P. Vijandran & Zulkifli, Shearn Delamore & Co.*

KRISHNA SREEDHARA PANICKA v. CHIAM SOH YONG REALTY COMPANY LTD.

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) December 23, 1975]

[Johore Bahru — Federal Court Civil Appeal No. 21 of 1975]

Landlord and Tenant — Application for recovery of premises — Whether controlled premises — Premises built before January 31, 1948 — Premises demolished and rebuilt — Substantial or fundamental alteration — Whether new building created — Burden of proof — Control of Rent Act, 1966, s. 4(2).

Evidence — Burden of proof — Burden of proof that premises were not controlled premises.

The respondents had obtained vacant possession of the premises, which were built before January 31, 1948 and thereafter had demolished it except for the party wall and the rear wall, and rebuilt it. The appellant subsequently became the tenant of the first floor of the premises. The respondents served a notice to quit on the appellant and on his failure to comply, they commenced an action for possession. The learned President of the Sessions Court held that the onus of proof that the premises were controlled premises was on the appellant. After hearing evidence he held that the alterations to the premises were so substantial that they had the effect of fundamentally changing the identity and character of the building and he entered judgment against the appellant for the respondents as prayed. The appellant appealed to the High Court, which dismissed the appeal. The appellant then appealed to the Federal Court.

Held (Gill C.J. and Raja Azlan Shah F.J., Ali F.J. dissenting) dismissing the appeal: the only true conclusion to be derived from the facts was that after the demolition of the old building and the rebuilding, a new building came into existence and therefore the learned judge in the High Court was right in dismissing the appeal.

Cases referred to:-

(1) *Mohamed Myddin* v. *Teo Mek Yok* [1966] 2 M.L.J. 284.

(2) *Leong Yoong* v. *Lee Sem Yoong* [1968] 2 M.L.J. 72.

(3) *A.V. Vandayar & Ors.* v. *Sivagami Achi & Anor.* A.I.R. 1949 P.C. 319.
(4) *Yong Chiang* v. *Bong Tjhin Oi* [1973] 2 M.L.J. 136.
(5) *Government of State of Penang & Anor.* v. *B.H. Onn & Ors.* [1971] 2 M.L.J. 235.
(6) *Pritam Kaur* v. *Rajaratnam & Anor.* [1970] 2 M.L.J. 109, 110.
(7) *Kai Nam* v. *Ma Kam Chen* [1956] A.C. 358.
(8) *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* [1967] 2 M.L.J. 195.
(9) *Success Enterprises Ltd.* v. *Eng Ah Boon* [1968] 1 M.L.J. 75.
(10) *Bank Negara Indonesia* v. *Philip Hoalim* [1973] 2 M.L.J. 3, 4.
(11) *Tioh Kooi Lan* v. *Ismailjee* [1972] 1 M.L.J. 64.

FEDERAL COURT.

C. K. G. Pillay for the appellant.

Keith Sellar for the respondents.

Gill C.J. (Malaya): This is an appeal from the dismissal by Syed Othman J. of the appellant's appeal from a judgment of the President of the Sessions Court at Johore Bahru allowing the claim by the respondent company as plaintiffs in the action against the appellant as defendant for the recovery of vacant possession of premises No. 25A Jalan Ah Fook, Johore Bahru, together with mesne profits from March 1, 1971.

The relevant facts of the case are not in dispute. The premises in question used to be the first floor of an old building known as No. 25 Jalan Ah Fook which was built before January 31, 1948 and purchased from the previous owner by one Chiam Soh Yong, a director of the plaintiff company, in October 1949. The ground floor of the building was then used as a motor repair shop. The first floor, the access to which was by a staircase inside the ground floor, consisted of 11 or 12 rooms which were let out to tenants.

As the building was in a bad condition, Chiam Soh Yong decided some time in 1958 to carry out certain alterations to it. He obtained vacant possession of the building from the then tenants and proceeded to apply for permission from the Johore Bahru Town Council for such alterations. The Town Council approved the plan for the demolition and rebuilding of the premises, being plan No. 150/58, on March 30, 1959. The premises were demolished, except for the party wall and the rear wall, and rebuilt between the months of April and October 1959.

The work done for the purpose of rebuilding was as follows. The floor of the ground floor was broken up and the foundation strengthened. A new concrete floor was laid. The old staircase leading from the inside of the ground floor to the first floor was demolished, and the entire wooden floor on the first floor was replaced with a concrete floor. In the front two new columns were added to the front wall of the building to support the new first floor and its concrete facade. The old roof and beams were demolished and replaced by new ones. All the windows were altered. Formerly they were round and made of wood; now they are of metal. A winding staircase was built at the back leading up to the first floor. For access to the first floor a new staircase was built on the front right side of the building as one faces it.

The entrance to this staircase to the first floor is outside the building and not inside the ground floor, thus giving the first floor a completely separate and independent access. As a result of the alterations and rebuilding the first floor became completely cut off from the ground floor. As such, the Town Council rated it separately as premises No. 25A from the premises on the ground floor now known as premises No. 25 Jalan Ah Fcok, Johore Bahru.

The defendant became the tenant of premises No. 25A some time in 1961 at a monthly rental of $320. He is also the tenant of premises No. 25 with which we are not concerned in this appeal. Chiam Soh Yong transferred the premises to the plaintiff company in October 1964. The plaintiffs served on the defendant a notice in writing dated January 17, 1971 requiring him to quit the premises on the expiry of the notice on February 28, 1971. On the defendant failing to comply with the notice, the plaintiffs commenced an action in the Sessions Court at Johore Bahru for vacant possession of the premises together with mesne profits from March 1, 1971.

At the trial of the action before the learned president of the Sessions Court it was argued by counsel for the defendant that, as the premises were built before January 31, 1948, the onus of proof that the premises were not controlled premises was on the plaintiffs so that it was for them to begin. Counsel for the plaintiffs contended that as the defendant was claiming protection under the Control of Rent Act 1966 it was for him to begin. The learned president, following the decision of this court in *Mohamed Myddin* v. *Teo Mek Yok*,(1) ruled that the onus was on the defendant and therefore called on him to begin. Both sides gave evidence.

It was clear from the evidence that the premises were first built before January 31, 1948. But on the evidence before him the learned President found that the alterations carried out to the first floor of what before 1958 was No. 25 Jalan Ah Fook were so substantial that they had the effect of fundamentally changing the identity and character of that part of the building. He therefore held that on the balance of probabilities the defendant had failed to prove that premises No. 25A Jalan Ah Fook were controlled premises. Accordingly, he entered judgment against the defendant for the plaintiffs as prayed.

I would pause here to observe that the learned president was wrong in holding that the onus of proof that the premises were controlled premises within the meaning of section 4(1) of the Control of Rent Act 1966 was on the defendant. This would seem clear from the decision of this court in the later case of *Leong Yoong* v. *Lee Sem Yoong*,(2) following the decision of the Privy Council in *A. V. Vandayar & Ors.* v. *Sivagami Achi & Anor.*,(3) that the onus of proof in such cases would lie upon the landlord. In the more recent case of *Yong Chiang* v. *Bong Tjhin Oi*(4) this court expressed the opinion that *Mohamed bin Myddin* v. *Teo Mek Yok*(1) had been decided *per incuriam* because the attention of the members of the court then sitting had not been drawn to the Privy Council decision in *A. V. Vandayar's case.* As was observed by the Privy Council in that case, the question of onus of proof is not of

paramount importance when the whole of the evidence is on record. In the more recent case of *Government of State of Penang & Anor.* v. *B. H. Oon & Ors.*[5] the Privy Council stated that the question of onus of proof would be relevant only in a case where there was no evidence or where the evidence was so evenly balanced that there was no preponderance of probability. It would therefore seem clear that the question of onus of proof in the appeal before us would be purely academic. It was perhaps for this reason that the learned judge in the court below did not consider it necessary to deal with it.

In dealing with the appeal before him the learned judge considered a number of decided cases which were cited to him and had been cited in the Sessions Court. As he has stated at the commencement of his judgment, the appeal before him turned on the finding of the learned President to the effect that by the extensive repairs carried out to the building in 1959 the premises in question became a separate unit and should be treated as a building completed after January 31, 1948, so that the provisions of the 1966 Act do not apply to it.

It will be useful to refer briefly to these decided cases. In *Pritam Kaur* v. *Rajaratnam & Anor.*[6] Raja Azlan Shah J. (as he then was) said: —

"The phrase 'buildings completed after January 31, 1948' in section 4(2) of the 1966 Rent Act envisages either of two situations:—

(1) a building on which construction work was started before January 31, 1948 but which is still uncompleted till a date after January 31, 1948;

(2) a building completed before January 31, 1948 but which has since that date been so fundamentally changed that it can no longer be said to exist and another building has replaced it."

His Lordship then went on to say:

"The test whether the old building was so substantially or fundamentally altered so as to become a 'new building' under the 1956 Ordinance or merely another 'building completed after January 31, 1948' under the 1966 Act remains the same."

It is clear that in dealing with this appeal it is necessary to consider only the second situation.

The test, as stated by the Acting Chief Justice of Hongkong and approved by the Privy Council in *Kai Nam* v. *Ma Kam Chan,*[7] is that where the damage to a building has been so extensive, so that there is nothing left which could possibly be called a building, the existence of that building as a building is terminated and a building replacing it would be an entirely new building, though it was built on the same foundation and had the same floor. That test was followed in the two Singapore cases of *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* [8] and *Success Enterprises Ltd.* v. *Eng Ah Boon*[9] and our own case of *Yong Chiang* v. *Bong Tjhin Oi*[4] to which I have already made reference.

Applying the principles laid down in the above cases to the present case, the learned judge found that, as the repair work that had been done to 25A was very extensive and substantial parts of the building were demolished and replaced, he could not see that the findings of the learned President were at variance with such principles. He therefore dismissed the appeal with costs.

No difficulty arises in the case of a new building erected on the site of an old building which has been destroyed by a bomb or by a fire. Where, however, alterations are made to an existing building the question whether it becomes a new building is always a question of degree depending on the facts of each particular case. This would seem clear from the two Singapore cases.

The main argument in support of the present appeal is that this was a case of self-induced repairs by the landlord of the premises and that prior to the reconstruction of the premises no certificate was obtained from the President or Chairman of the Rent Assessment Board to demolish and rebuild as required under section 12(1)(m) of the Control of Rent Ordinance 1956. In my judgment section 12(1)(m) of the Ordinance has no application where a landlord in order to demolish and rebuild is able to obtain possession of the premises from his tenant or tenants. A certificate of the Board is necessary only where the landlord has to obtain an order of court to evict a tenant who stands on his statutory right to remain in possession. In other words, section 12 of the Ordinance merely places restrictions on the right of a landlord to possession.

It would seem clear that the state of the old building in the present cases after it had been demolished with the approval of the Town Council was no different from the state of the building in the Hongkong case or in the Muar case of *Yong Chiang*. In *Bank Negara Indonesia* v. *Philip Hoalim,*[10] Lord Wilberforce delivering the judgment of the Privy Council said:

"It is not a necessary condition for the creation of a new building that the old building should be in danger of collapse: the test is the degree of change effected."

The facts in that case were as follows. The foundation of the old building and the lateral walls remained, but the front and rear facades were entirely removed and replaced. The existing floors remained, though that on the ground floor was broken up and a new concrete floor was laid in place of a wooden floor. At the rear of the first floor a new third floor and a mezzanine floor were constructed; the existing staircase was removed and two new staircases were put in. All wooden partitions on the first and second floors were removed. A new roof was constructed. It was held on those facts by the Privy Council that the trial judge was amply justified in his conclusion that a new building had come into existence.

The facts in the present case are not different from the facts in that case. After the demolition of the old building all that remained were the two lateral walls and the rear wall. It was on that shell of the old building that an entirely new building was constructed. The only true conclusion to be derived therefrom is that a new building had come into existence in the present case. In other words, it was a building completed after January 31, 1948 and therefore outside the provisions of the Control of Rent Act 1966. The learned judge in the court below was therefore quite right in dismissing the appeal.

I would dismiss this appeal with costs.

Ali F.J.: The point for determination in this appeal is whether premises No. 25A, Jalan Ah Fook, Johor

Bahru, is a "building completed after January 31, 1948" within the meaning of paragraph (a) sub-section (2) of section 4 of the Control of Rent Act 1966.

Section 4 is in these terms —

"4.(1) Except for the premises mentioned in subsection (2) all premises shall be subject to the operation of the provisions of this Act and any such premises shall for the purposes of this Act be called 'controlled premises'.

(2) The following premises shall be free from the operation of any of the provisions of this Act, namely —

(a) buildings completed after the 31st day of January, 1948;

(b) premises which are the property of the Government of the Federation or of the Government of any State;

(c) premises which are vested in or acquired by or on behalf of any Municipality for the purposes of the Municipal Ordinance of the Straits Settlements in force in the States of Malacca and Penang and as extended to apply to the other States by virtue of the Municipal Ordinance (Extended Application) Ordinance, 1948;

(d) furnished premises let at a rental which includes board; and

(e) premises which cease to be controlled premises by virtue of section 23."

The point arose in a dispute between the landlords, respondents in this appeal, and the tenant, the appellant, over possession of the said premises.

In an action commenced in the Sessions Court, Johor Bahru the landlords claimed possession on the basis that the premises is not controlled premises being "a building completed after January 31, 1948" within the meaning of the phrase in the Act.

The tenant, contending otherwise, claimed protection under the Act.

In the plaintiffs' "Further and Better Particulars" dated October 23, 1971 the premises was described as follows:

"(1) The premises in question were built before January 31, 1948;

(2) The premises in question were demolished save and except the party walls, the rear walls and a portion of the rear of the premises and rebuilt between the months of April and October, 1959.

(3) The demolition and rebuilding of the premises in question were approved by the Town Council, Johor Bahru. Plan No. 150/58 was approved on March 30, 1959."

Prior to the so-called "demolition and rebuilding" the premises was known as No. 25, Jalan Ah Fook, Johor Bahru. Its ground floor was being used as a motor workshop and on the first floor were 11 or 12 rooms which were let out to tenants. Structurally or otherwise No. 25 was identically the same as No. 27 next door being in one row of shophouses. In 1958 the landlords decided to make certain alterations to the said premises.

According to the evidence at the trial alterations and additions were carried out according to the plan approved by the Town Council, Johor Bahru. The plan was for "Alterations and Additions". The contractor who did the work had said that he constructed a winding staircase at the back where there was none before together with an entrance door leading to the first floor. The roof was replaced with a new one. So also the front wall of the first floor. Those walls which remained were scraped by renewing old parts and putting in new bricks to replace broken ones. Two new columns were added to the front of the building presumably to strengthen the support of the first floor which was formerly made of wood but now made of concrete. The old staircase inside the building connecting the ground floor with the first floor was demolished and a new staircase made so that access to the first floor is now from outside in front of the building. The wall at the rear which was broken was replaced with a new wall. All the windows of the first floor were replaced with new square metal windows. The contractor said he strengthened the foundation of the building but could not remember what method he used. Lastly, he said, he built a septic tank. The total cost for the alterations and additions was about $25,000.

After the alterations were completed the ground and first floors became "separate entities" and referred to as No. 25 and No. 25A respectively. All the rooms on the first floor were demolished and there is now an open space or a hall which the tenant is using as a classroom for his commercial school. He went into occupation sometime in 1961 paying a monthly rent of $320. Later he also became a tenant of the ground floor, No. 25, paying a monthly rent of $680. We were told at the hearing that the plaintiffs have brought proceedings in the High Court to recover possession of the ground floor No. 25 and that the fate of that action depends on the outcome of the present proceedings.

On the facts as stated above the learned trial President concluded in these words —

"... the court holds that the alterations carried out to the 1st. floor of what before 1958 was No. 25, Jalan Ah Fook were so substantial that they had the effect of *fundamentally changing the identity and character of that part of the building namely that from being part of one entity known as No. 25, Jalan Ah Fook it had now since 1959 become a separate independent entity and also from being a place consisting of many rooms let out for human habitation.* I find these so notwithstanding that the works carried out were for 'alterations and addition' not specifically 'reconstruction'. No. 25A, Jalan Ah Fook therefore is deemed to be 'new premises' 'built' in 1959 and is therefore not subject to the Control of Rent Act. The defendant has failed, on the balance of probabilities, to prove that No. 25A, Jalan Ah Fook are controlled premises. The notice to quit served on the defendant by and on behalf of the plaintiff company's solicitors on January 17, 1971 was therefore good in law." (The italics are mine).

In upholding the respondents'/landlords' claim the learned president has undoubtedly taken the view that the meaning of the phrase "buildings completed after January 31, 1948" includes buildings though existing on or before the said date but have after the date been so fundamentally changed that they have become new buildings. This extended meaning was approved by the High Court in *Pritam Kaur* v. *Raja Ratnam*[6] and in *Tioh Kooi Lan* v. *Ismailjee*.[11] I have used the word "extended" advisedly as in my view the true meaning of the words "buildings completed" is buildings which did not exist on or before the date mentioned but which came into existence after the date. The reason for this view is that when the Control of Rent Ordinance 1948 was brought into force on January 31, 1948 it could not have any effect on buildings which did not exist. That such was the intention seems clear from the definition of "premises" in section 2 of the Ordinance which expressly excluded new buildings completed after the commencement of the

Ordinance. For similar reason the same meaning must also be given to the phrase in the Control of Rent Ordinance 1956 which repealed the 1948 Ordinance and the phrase in the present Act, *i.e.* the Control of Rent Act 1966 which repealed the 1956 Ordinance. The omission of the word "new" in the Act need not make any difference to the true meaning of the phrase if the word "completed" is given its proper meaning.

The word "completed" used in relation to the work of bringing a building into existence can only mean the completion or finish in the construction of the building which is not the same thing as the completion of repair or alterations work carried out in relation to an existing building. This must be so as a building, the construction of which has not been completed or which cannot be used as a dwelling house, a flat or a factory etc., is not a premises within the meaning of the word "premises" as defined in section 2 of the Act. If the true meaning of the phrase in the Act is as I have given above the learned trial president in the instant case cannot be right in applying the test which was approved by the High Court in *Pritam Kaur* v. *Raja Ratnam*[6] and in *Tioh Kooi Lan* v. *Ismailjee*[11] following the decision or decisions of the Singapore courts in *Eastern Realty Co. Ltd.* v. *Chan Hua Seng*,[8] in *Success Enterprises Ltd.* v. *Eng Ah Boon*[9] and in *Bank Negara of Indonesia* v. *Philip Hoalim*.[10] In the last named case the extended meaning was approved by the Privy Council.

In the consideration of the question whether or not the meaning of the phrase can be so extended I find it necessary to refer to section 9(1)(b) of the Act which reads as follows:

"9.(1) In either of the following cases, namely —

(a) where, after the fair rent of any controlled premises has been determined in accordance with the provisions of this Act, the rate payable by the landlord in respect of such controlled premises has been increased; or

(b) where since the date by reference to which the fair rent of any controlled premises is determined the landlord has, in connection with the restoration, the improvement or the making of structural alteration of the premises, incurred expenditure (not including expenditure on decoration or ordinary repairs),

subject to the provisions of the following subsections, the fair rent of any controlled premises may be increased in the case mentioned in paragraph (a) to the extent which shall not exceed the amount of the increase of rates payable in respect of such controlled premises, and in the case mentioned in paragraph (b) to the extent which shall not exceed such sum as will allow the landlord a reasonable return in respect of such expenditure."

In terms of paragraph (b) above it would seem clear to me that structural alterations, however substantial, would not change the status of an existing premises so that a tenant who goes into occupation of such premises must be entitled to the protection under the Act. He is not so entitled if the premises has ceased to be so under section 23. Section 4(2)(e) of the Act is to that effect. But section 23 does not apply to this case.

On the view which I take of the effect of section 9(1)(b) I think it is not possible to give the phrase the extended meaning approved by the High Court in *Pritam Kaur* v. *Raja Ratnam*[6] and in *Tioh Kooi Lan Ismailjee*.[11]

Why such meaning was given to the phrase in the Singapore Ordinance by the Singapore courts and why it was approved by the Privy Council in *Bank Negara of Indonesia* v. *Philip Hoalim*[10] was perhaps because in terms of the provisions of the Singapore Ordinance it was possible to do so. Beyond that I am unable to say.

At the hearing of this appeal our attention was drawn to the decision of the Federal Court in *Yong Chiang* v. *Bong Tjhin Oi*,[4] the facts of which were not the same as here. There the shophouse No. 50, Jalan Abdullah, Muar was extensively damaged as a result of looting and burning. On page 140 of the report Suffian F.J., (as he then was) said —

"... That test, as stated by the Acting Chief Justice of Hongkong and approved by the Privy Council, is this: where the damage has been so extensive, so that there is nothing left which could possibly be called a building, then the existence of that building as a building is terminated and a building replacing it would be an entirely new building though it was built on the same foundations and had the same floor.

Applying that test to the facts in this case, I am of the opinion that shophouse No. 50, Jalan Abdullah, Muar, at the material date is a building completed after January 31, 1948, and therefore not subject to the Act.

As a result of looting and burning during the Japanese invasion, all that was left of the building were only two side walls, and part of the back wall, and the place was open to the sky with grass growing on the ground and was not fit for human habitation. Nobody walking down Jalan Abdullah in 1949 could possibly say that there was a building there."

In my view the Hong Kong test in *Kai Nam* v. *Ma Kam Chan*[7] is consistent with the true meaning of the phrase for the reason that if the old building which was controlled premises had in fact ceased to exist as a building or as stated by Lord Cohen in the Privy Council "was so far beyond repairs that it could no longer be said to exist as a building" any building which now stands on the same site and on the same foundation replacing it must be "an entirely new building" in the context of the Hong Kong Ordinance or in the context of our Act a building (the construction of which was) completed after January 31, 1948. I have no doubt that *Yong Chiang* v. *Bong Tjhin Oi*[4] was correctly decided in view of the finding that the old building No. 50, Jalan Abdullah, Muar was so far beyond repairs that it could no longer exist as a building which could be used for any of the purposes mentioned in the definition of "premises". But the Hong Kong test cannot be applied here as the facts were different. Indeed, it is clear that the learned trial President had applied a different test, that is to say, the test adopted in the Singapore cases already referred to. He did so on the finding that the old building No. 25, Jalan Ah Fook, Johor Bahru had fundamentally changed and become a new building as a result of substantial alterations. The learned appeal judge in the instant case, therefore, erred in thinking that the Hong Kong test had been applied. If the Hong Kong test is not applicable here, the question whether or not self induced demolition would attract the test becomes irrelevant.

Coming back to the other test, *i.e.* the fundamental test as applied in *Eastern Realty Co. Ltd.* v. *Chan Hua Seng*,[8] *Success Enterprises Ltd.* v. *Eng Ah Boon*,[9] and *Bank Negara of Indonesia* v. *Philip*

Hoalim[10] and in Malaysia in *Pritam Kaur* v. *Raja Ratnam*[6] and *Tioh Kooi Lan v. Ismailjee*[11] I am further of the view that even if it be possible to apply it to a situation arising in Malaysia the alterations have to be something more than the alterations mentioned in section 9(1)(b). How much more would necessarily depend on the facts of each case. The learned Chief Justice, Singapore, Wee Chong Jin J. foresaw this difficulty when he said that no test of universal application can be laid down. In *Bank Negara of Indonesia* v. *Philip Hoalim*[10] Lord Wilberforce had said, on page 4 of the report, that the test is the degree of change effected to the old building. Unless the degree of change effected is greater than what is envisaged in section 9(1)(b) a tenant coming into possession of such a premises cannot be deprived of the protection under the Act. He may be liable to pay an increase in the fair rent but that is not a matter for the court.

I wish to make it quite clear that I have no quarrel with the learned trial president's finding of facts. I agree with him that some substantial alterations and additions have been made to the building. The new roof, the concrete floor on the first floor, the new windows and the new winding staircase at the back have undoubtedly made the building No. 25 Jalan Ah Fook, Johor Bahru a better building than the adjoining building No. 27. But that is neither here nor there. From his judgment he seemed to have directed his mind to two main things (1) the change of the first floor No. 25A from being part of a single entity to a separate and independent entity; and (2) the change from being a place with rooms for human habitation to an open space or a hall. These changes, in my respectful opinion, were not changes in the building itself or in the general structure of the building. The change in (1) was only a change in the manner in which the building was assessed for rates, and the change in (2) was merely a change in the use of the first floor. The change envisaged in the Singapore test is a change in the physical structure of the building as would lead to the conclusion that a new building has come into existence. Having carefully compared the facts in each of the Singapore cases with the facts in this case I am unable to come to that conclusion. In my opinion the building No. 25 Jalan Ah Fook, Johor Bahru had not ceased to exist. The fact that the approved plan was only for "alterations and additions" and not for demolition and rebuilding as incorrectly stated in paragraphs (2) and (3) of the plaintiffs' further and better particulars dated October 23, 1971 would support the view that no major structural changes could possibly be made to the building. Any such changes must necessarily involve the adjoining buildings which would require a different plan for approval.

For the reasons stated above I would allow this appeal.

In considering this appeal I note that the learned trial president had also dealt with the question relating to burden of proof and has taken the view that the burden is on the tenant to prove that premises No. 25A is controlled premises. He took this view, apparently, following the decision of the Federal Court in *Mohamed bin Myddin* v. *Teoh Mek Yeoh*.[1] I would point out, however, that according to Suffian F.J. (as he then was) in *Yong Chiang* v. *Bong Tjhin Oi*,[4] *Mohamed bin Myddin* v. *Teoh Mek Yeoh*[1] was decided *per incuriam* and that in his view the burden is on the landlord to prove that the premises is not subject to the Act following, as he did, the view taken in *Leong Yoong* v. *Lee Sem Yoong*[2] and in the Privy Council case of *A. V. Vandayar & Ors.* v. *Sivagami Achi and Another*.[3] With respect I agree with Suffian F.J. (as he then was) that the language of section 4 of the Control of Rent Act 1966 puts the burden on the landlord.

Accordingly, I would set aside the judgment of High Court and the order of possession made by the learned trial President of the Sessions Court. The respondents shall pay the costs of this appeal, the costs in the High Court and also the costs in the Sessions Court.

Raja Azlan Shah F.J.: In this appeal from the High Court, Johore Bahru, yet another thorny question as to the true construction of the Control of Rent Act, 1966, is raised. This time the question is as to the effect of the Act when a building is, by structural alterations, or, as counsel for the appellant put it, by self-induced alterations, converted into two premises, each of which is let at a separate rent, as a separate building, and is assessed and rated separately. This case is different from the case in which a house at Jalan Maaroff, Kuala Lumpur, was repaired and extended (see *Pritam Kaur* v. *Rajaratnam*,[6] and another case in which the front portion of a single-storey shophouse in Slim River was gutted and repaired (see *Tioh Kooi Lan* v. *Ismailjee)*.[11] In both these cases, repairs and renovations were effected but the buildings were not "buildings completed after January 31, 1948." In the recent case of this court of *Yong Chiang* v. *Bong Tjhin Oi*[4] both those cases were reviewed at some length. That was a case of rebuilding. A shophouse in Muar was looted and burnt during the war. After the fire it was an empty house with no one staying there and the ground floor was an empty space with grass growing on it. The first floor which was made of wooden plank had gone, the front wall and the top portion of the rear wall had collapsed, but the side wall was standing and charred. The house was thereafter completely renovated and repaired and a certificate of fitness was issued by the Town Council. Suffian F.J. (as he then was) had to decide whether, in view of the extensive nature of the repairs and renovations, the shophouse was completed after the relevant date. He adopted the test as stated by the Acting Chief Justice of Hongkong and approved by the Privy Council in *Kai Nam* v. *Ma Kam Chan*.[7] The test is —

> "where the damage has been so extensive, so that there is nothing left which could possibly be called a building, then the existence of that building as a building is terminated and a building replacing it would be an entirely new building though it was built on the same foundations and had the same floor." (page 140).

Applying that test the Lord President came to the conclusion that at the material date "an altogether different building — a new building — has arisen from the ashes of the old even though it was built on the same foundations and had the same ground floor."

I now ask this question: Does the test in Kai Nam's case apply only to cases of buildings "thereafter" *damaged and repaired*, and, as the case may be, *rebuilt*, and not to cases of *bona fide repairs and renovations* (italics are mine). The Lord President seems to think so. He also seems to suggest that the test applied in *Pritam Kaur's case* is apt only to cases of repairs and renovations, and not to rebuilding. It is of significance to note his reasoning in *Yong Chiang's case*. He found no difficulty in reconciling the rent statutes of Hongkong and Singapore and our own, in spite of the different words used. Yet he did not even mention the Privy Council case in *Bank Negara Indonesia* v. *Philip Hoalim*[10] which was delivered in May, 1973. It may well be that that case was not yet reported when *Yong Chiang's* was decided. Be that as it may, I do not like to suggest that *Yong Chiang's case* was *per incuriam*.

Bank Negara Indonesia is a case of self-induced repairs and renovations. In that case extensive repairs were carried out to an old two-storey building in Malacca Street, Singapore. The foundation and the lateral walls remained, but the front and rear facades were entirely removed and replaced; the ground floor and rear of first floor were replaced by a new concrete floor; a new third floor and a mezzanine floor were added, the existing walls strengthened to support them; and a new strong room and lift well were constructed. The trial judge held that the works carried out went far beyond repairs and that there had been such a fundamental change to the old building that it could no longer be said to exist as such. The Court of Appeal reversed that finding on two grounds one of which was that the former building was still a substantial building which was in no danger of collapse and that it could still be used for the professional or commercial activities of the tenants. This reasoning did not find favour with their Lordships who took the view that the question of collapse was irrelevant. Their Lordships dismissed the appeal because they felt constrained to do so by authority. The speech of Lord Wilberforce throws no doubt on the matter, that "whether an old building which has been altered, or reconstructed, becomes a new building is a question of fact and degree — see *Eastern Realty Co. Ltd.* v. *Chan Hua Seng*[8] *per* Wee Chong Jin C.J. and *Kai Nam* v. *Ma Kam Chan*, *supra*. The former case is concerned with repairs and extensions. The Chief Justice of Singapore adopted the Kai Nam test and said that the test is always a question of degree whether a building because of such substantial and/or other alterations becomes a new building. *Kai Nam* v. *Ma Kam Chan* is a case of rebuilding, and the test also is a question of fact and degree.

It seems to me, on principle and authority, that whatever the case may be, be it a case of self-induced repairs and renovations or extensions, or damage and repairs, or rebuilding, the test is the same — the degree of change effected. This line of reasoning, in my opinion, is also implicit in the judgment of the Lord President in *Yong Chiang's case* where he opined that, in spite of the dissimilarity in the three rent statutes, the test whether a building is excepted from the operation of any of the statutes is the same, and that is, the degree of change effected.

It is significant to note that in *Pritam Kaur's case* I adopted the reasoning of Winslow J. in *Success Enterprises Ltd.* v. *Eng Ah Boon*[7] who followed the test of Wee Chong Jin C.J. in *Eastern Realty Co. Ltd.*, which in turn was approved and applied in *Bank Negara Indonesia* v. *Philip Hoalim*. *Eastern Realty Co. Ltd.* v. *Chan Hua Seng* is a case of repairs and extensions and the test applied was the degree of change effected. In *Pritam Kaur's case* I held that the repairs and extension work were not so substantial as to affect the general structure of the house. Although I did not say in so many words, it is implicit in my judgment that it is a question of substance and degree. In other words it is a question of degree of change effected. If this test was applied to cases of repairs and renovations as was done in *Eastern Realty Co. Ltd.* v. *Chan Hua Seng*, *Success Enterprises Ltd.* v. *Eng Ah Boon*, and *Bank Negara Indonesia* v. *Philip Hoalim*, *a fortiori* it applies to the present case under appeal — repairs and extensions. To hold otherwise, in my opinion, would make the decisions in *Eastern Realty Co. Ltd.* and *Bank Negara Indonesia* untenable.

With respect, the *Kai Nam test* as applied by the Lord President in *Yong Chiang's case* and also by the Privy Council in *Bank Negara Indonesia* v. *Philip Hoalim* is pertinent not only to cases of buildings "thereafter" damaged and repaired and, as the case may be, rebuilt, but also to cases of *bona fide* repairs and renovations. But in applying the test to the latter category of cases, the court must be astute to see that the owner is not violating the restriction imposed by the Act by some small, and possibly colourable, alterations of the structure. If there is a substantial structural alteration to the building, so that it has changed its identity, and two different premises are in fact created, each of which is let at a separate rent as a separate building, and is assessed and rated separately, then it can be said that the building has ceased to exist as such and that two different buildings have come into existence. And if the buildings came into existence after the relevant date, then they are excepted from the operation of the Act.

On this point the learned president found that "the alterations carried out to the first floor of what before 1958 was No. 25, Jalan Ah Fook were so substantial that they had the effect of fundamentally changing the identity and character of that part of the building namely that from being part of one entity known as No. 25, Jalan Ah Fook it had now since 1959 become a separate independent entity and also from being a place consisting of many rooms let out for human habitation." The question of change of identity and character is primarily an inference to be drawn by him. It is a question of fact and degree. If he has directed himself properly, this court can only interfere if it is quite plain that he has come to the wrong conclusion.

That brings me to the question of burden of proof. It is now said that the learned president erred when he followed *Mohamed bin Myddin* v. *Teo Mek Yok*[1] and called upon the appellant/tenant to begin. I agree that up to that point he is clearly wrong. Our rent law does not prescribe a change affecting the general principles of evidence regarding the burden of proof enacted in section 102 of the Evidence Act, 1950. Under that

section the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In this case the respondent/landlord claims possession against the appellant/tenant who seeks protection under the Act. It is not denied that the said tenant is a tenant of the premises within the meaning of the Act. And as such he is entitled to protection unless the landlord can bring himself within the proviso of section 4(2)(a) of the Act. The onus thus lay on the landlord to prove that the building was completed after the relevant date — see *Leong Yoong* v. *Lee Sem Yoong*[2] and echoed in *Yong Chiang's case*. Be that as it may, I think, the matter is now academic as the whole of the evidence is on record — see *A. V. Vandayar & Others* v. *Sivagami Achi and Another*[3] as applied in *Yong Chiang's case* (page 137).

It is always a question of law, which will warrant the interference of this court, whether there is any evidence to support the president's findings of fact and whether the inferences he has drawn are possible inferences from the facts as found. It seems to me that in this case I cannot say that he is so clearly wrong that this court can interfere. The material facts, so far as they are known, are not disputed, and the inferences which he has drawn are possible inferences from the facts found. The fact that there is no evidence of extensive or irreparable damage can find no place in determining the question whether a building is completed after the relevant date and therefore excepted from the operation of the Rent Act — see *Bank Negara Indonesia* v. *Philip Hoalim* on page 4.

I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *C. K. G. Pillay & Co.; Keith Sellar, Tennakoon & Pillai.*

HENRY WONG JAN FOOK v. JOHN LEE & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) December 31, 1975]

[Kuching — Federal Court Civil Appeal No. 63 of 1975]

Practice and Procedure — Application to strike out paragraph of defence — Libel — Rolled-up plea — Fair comment — Not alleged to be on matter of public interest — R.S.C. 1957, O.25 r.4.

Tort — Libel — Fair comment — Not alleged to be on matter of public interest.

The appellant alleged that the first respondent wrote and published a letter which had injured the credit and reputation of the appellant. In his defence the first respondent admitted that he wrote and published the letter, but pleaded that "in so far as the words consist of allegations of facts they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts." The appellant applied by summons in chambers to have the paragraph of the defence struck out on the ground that it was not alleged that the comment was on a matter of public interest and that even if so alleged the purported comment could not be brought within "a matter of public interest." The learned judge before whom the application was brought rejected it and the appellant appealed to the Federal Court.

Held, allowing the appeal: as the defence pleaded was one of fair comment and not one of fair comment on a matter of public interest, the application to strike out the paragraph of the defence should have been allowed.

Cases referred to:-

(1) *Kemsley* v. *Foot* [1951] 2 K.B. 34.

(2) *Sutherland* v. *Stopes* [1925] A.C. 47.

FEDERAL COURT.

T. O. Thomas for the appellant.

S. Sahathevan for the respondents.

Suffian L.P. (read by **Lee Hun Hoe C.J. (Borneo)**): The plaintiff was an employee of the second defendant. On or about June 23, 1970, the first defendant (a fellow employee) wrote a letter to the plaintiff concerning the plaintiff. The first defendant apparently sent copies to the Sarawak Commercial Employees' Union, to Mr. G. Creighton (the Managing Director of the second defendant) and also to the Secretary/Accountant of the second defendant. The plaintiff pleaded that his service with the second defendant was terminated by the second defendant with effect from August 17, 1970; that the first defendant had falsely and maliciously written that letter; and that as a consequence of that letter he had been greatly injured in his credit and reputation, and in his character as a commercial employee and had been unable to get another job.

The second defendant denied having written or published the letter.

The first defendant admitted that he wrote and published it, but pleaded that "in so far as the words consist of allegations of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts."

The first defendant then gave particulars as follows:—

"In December, 1969, the plaintiff was an Acting Clerk-in-charge of the [second defendant's] branch in Miri and on December 8, 1969, the defendant [a mistake for plaintiff] issued a temporary receipt signed by him to a customer for the sum of $4,760. However, the office copy of the said receipt shows a sum of $149.16 paid by another customer."

The plaintiff by summons-in-chambers applied for an order that paragraph 3 of the defence be struck out under O.25 r.4 which reads —

"The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.",

and also under the inherent jurisdiction of the court. His counsel argued that paragraph 3 of the defence is a rolled-up plea of fair comment, that to succeed in that defence the words complained of must be shown to be (1) comment, (2) fair comment and (3) fair comment on some matter of public interest, that nowhere in the defence is it alleged that the comment is on a matter of public interest, and that even if it were so alleged, the purported comment cannot be brought within "a matter of public interest."

The learned judge before whom this application came rejected the application. He said that the crucial question was whether fair comment must be on some